United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7004

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/S

Docket Numbers 76-7004 and 76-7130

JUNIA E. RAAB,

Plaintiff-Appellant,

v.

TABER INSTRUMENT CORPORATION, JOSEPH P. D'ANGELO, BENJAMIN MANASEN, WARREN J. HILDEBRANDT, CINDY R. TABER AND MARINE MIDLAND BANK-WESTERN,

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of New York

BRIEF FOR DEFENDANTS TABER INSTRUMENT CORPORATION, JOSEPH D'ANGELO, BENJAMIN MANASEN, WARREN HILDEBRANDT, CINDY TABER AND MARINE MIDLAND BANK-WESTERN

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BRIEF FOR DEFENDANTS

QUESTIONS PRESENTED

1. Is there adequate support in the record for the finding by the court below that the plaintiff had failed to prosecute this action.
2. Was the defendants' motion to dismiss timely made.
3. Did the court below exercise properly its discretion to hear the motion to dismiss and the motion to vacate the judgment of dismissal on affidavits and oral argument presented by the parties rather than on oral testimony.

STATEMENT OF FACTS

Plaintiff's statement of the facts is incomplete and inadequate. It begins in 1973, ignoring the entire six year

period of delay between 1967 and 1973 on which the court below in part based its decision. Further, plaintiff's statement ignores the underlying substantive case leaving the erroneous impression that the defendants had no defense on the merits and for that reason resorted to a motion to dismiss. A brief alternate statement of the facts is set out below.

This is an action brought under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. Sec. 78j(b), seeking equitable relief in the form of rescission or, in the alternative, money damages. The complaint was filed in May, 1967. Eight years later, plaintiff had not yet brought the case on to trial. A motion to dismiss for failure to prosecute was filed by defendants on April 29, 1975. That motion was granted by the court below on November 25, 1975 and judgment was entered on the same day. Plaintiff appealed to this court on December 23, 1975. Plaintiff also moved on December 16, 1975, pursuant to Rule 60(b), Federal Rules of Civil Procedure, to set aside the judgment of dismissal. That motion was denied on March 7, 1976. On March 9, 1976 plaintiff appealed to this court from that decision. The two appeals have been consolidated for hearing before this court.

The plaintiff, Junia Raab, is a former employee of the Taber Instrument Corporation, one of the defendants. Raab was at one time the manager of a division of the company and over the years was given the opportunity to buy a small amount of company stock as a part of an informal incentive plan for key employees. App. 13-14.[1] Raab was discharged in February, 1965, after an investigation by one of the company's officers disclosed that on a number of occasions Raab had converted company money and property to his own purposes. App. 25-26, 146. Raab owned 600 shares of the company's stock at that time, and after his discharge the company's offi-

[1] References to "App." are to the Joint Appendix.

cers made a number of attempts to purchase it from him. Their offers began at $2.00 per share in 1965 and had reached $8.00 per share in 1966. App. 14-15. Over the years, the company had made substantial payments to a pension trust on Raab's account, but refused to pay any pension benefits to Raab after his discharge for the reason that only loyal, faithful employees should be entitled to benefit from the trust. Raab brought suit against the company to recover his pension benefits. App. 24-26, 147. In the spring of 1966, the parties negotiated a settlement of these and other outstanding claims that included the sale of Raab's 600 shares of stock to the company.[2] More than six months later, on December 30, 1966, the other shareholders sold the assets of the company to Teledyne, Inc. for the equivalent (in Teledyne shares) of $50.00 per share. App. 147-48. Raab then claimed that the company's officers and its lawyer failed to disclose material facts during the negotiations that preceded the sale of his stock, and on May 10, 1967 the complaint in this action was filed alleging violations of the federal statute and federal and state common law.

The defendants are the company and its officers and directors.[3] The company was a small, local business built

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[2] The company also had potential civil claims against Raab for conversion of its property.

The settlement brought Raab a total of $28,354 or $47.25 per share for his stock. App. 147.

[3] In May, 1967, when plaintiff's complaint was filed, the principal defendant was Ralph Taber. The company's assets had been sold to Teledyne and the Teledyne stock had been distributed to the company's shareholders. The company had only a small reserve fund of a few thousand dollars to be used for winding up its affairs. Benjamin Manasen, one of the directors, was retired and lived in Mexico much of the time. Joseph D'Angelo, a former officer and director, was a local dentist without substantial personal assets. Warren Hildebrandt, an officer and director, was an employee of the company who stayed to manage the company's former plants now that they were in Teledyne's hands. Mr. Hildebrandt was also without substantial personal assets. App. 511, Tr. 19-23.

[Footnote continued on page 4]

on the inventions in the electronics field made by its founder and president, Ralph Taber. It had two small plants in Buffalo, New York, and turned out a variety of highly sophisticated electronic measurement devices called transducers. The company's stock had always been closely held. In 1966 when the company's assets were sold, there were only 15 shareholders, who included Taber's lawyer, his dentist, several of his friends, and some of the company's officers and employees. Taber himself held 69% of the shares.[4]

Defendants' defenses to the *Raab* action were well-grounded and likely to succeed. There were no material facts to be disclosed because the Teledyne overture had been rejected prior to the sale to Raab; the facts known to the company were also known to Raab through his contacts with officers and managers of the company; and Raab had other important incentives to pursue the settlement of which the sale of his stock was a part. *See* discussion *infra* at pp. 28-34. Defendants would have sought to prove that after the initial rejection of the Teledyne offer, and after the Raab sale had been arranged, Taber suffered a serious health problem that made him consider retirement. Negotiations with several potential purchasers ultimately led to the company's assets being sold to Teledyne in December, 1966. Taber retired immediately and moved to Hawaii, where his wife still lives.

The plaintiff, faced with little probability of success, never prosecuted his action. Instead, he sought to maintain it in hopes of settlement. These hopes were buoyed by the existence of another action brought by a different shareholder, Joseph Less, for a much larger amount.

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[3] [Continued]

References to "Tr." are to the combined transcript of proceedings before the court below on June 3, 1974, July 24, 1974, November 5, 1974 and February 5, 1976.

[4] Plaintiff's Exhibit 4 in the *Raab* case is the Taber Instrument Corporation stock record book. *See also* App. 229-31.

Plaintiff's counsel had also brought the *Less* action against the company.

Even in the *Less* action, there were no real settlement efforts between 1967 and 1973. Settlement discussions were had only in the context of pretrial conferences as required of the parties by the court. On these occasions, defendants had consistently offered some part of the $300,000 that was being held in a special escrow account.[5] Plaintiff's counsel consistently demanded more than $1.2 million. App. 254, 286. This did not change until after June, 1974, when trial counsel, experienced in securities

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[5] Teledyne's extensive experience with acquisitions led it to adopt a policy of requiring an escrow account to be established *whenever* there were significant transactions with shareholders of a company acquired by Teledyne within one year of the acquisition. In the Taber Instrument Corporation acquisition there had been two such transactions, one with Raab and one with Less; therefore Teledyne insisted on an escrow. The Raab transaction, for only 600 shares, was considered insignificant and was not included in the escrow. However, with respect to the Less transaction, for 14,100 shares, Teledyne required an escrow of $300,000 worth of the Teledyne shares that were to be used to purchase the Taber Instrument Corporation assets. These shares were contributed by defendants Taber, Manasen, and D'Angelo, in equal amounts, from the total number of Teledyne shares that each of them received for their Taber Instrument Corporation stock. These documents are not included in the Joint Appendix. They are Plaintiff's Exhibits 15 and 23 in the *Less* case. The escrow agreement had an unusual provision that required the entire $300,000 to be used to meet a judgment against *any* of the three contributors or the company. Thus, even if one of the contributors was found to have had no part in the transaction, and thus to have no liability to Less, his share of the escrow would nevertheless be used to meet any judgment that Less might get. This provision contributed substantially to the incentive to settle the *Less* case. None of the contributors could retrieve their share of the escrow until litigation ended, and if litigation ended in a judgment against anyone, even for a default in defending, each contributor might lose his entire share.

The amount available to settle the case depended on the current price for Teledyne stock. There was a substantial risk that if the price of Teledyne stock declined, the contributors might have to add cash to reach a settlement amount. Therefore, the incentive to settle also depended, in part, on the current price for Teledyne stock.

litigation, became actively involved in the case. Thereafter, plaintiff's demand decreased to $800,000 by October 1, 1974, App. 286, and decreased again to $560,000 by October 30, 1974, an offer of settlement that defendants accepted. Tr. 114.[6]

Pursuant to the direction of the court, settlement efforts turned to the *Raab* case. Had Raab retained his stock until December, 1966, he could have received about $30,000 worth of Teledyne stock. Plaintiff's local counsel[7] demanded $27,000 in settlement, then decreased his demand to $25,000, then to $22,000, where he elected to stand firm. App. 548. This demand was far higher than any realistic range for negotiation.

Defendants then began further preparation for trial. As the case had increased in age, so had the participants in the transactions between Raab and the company. In February, 1973, Ralph Taber died. Taber had personally authorized and directed the purchase of the Raab stock.[8] In August, 1974, Charles McDonough died. App. 356. McDonough was counsel to Taber and to the company and represented the company in the negotiation and closing of the settlement with Raab in which Raab's

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[6] There were increasing pressures to settle the *Less* case after February, 1973 when Taber died. Taber was one of the named defendants and was potentially liable for the entire amount of the *Less* claim. While he was alive, the existence of the *Less* claim imposed no restrictions on his use of his assets. However, after he died, his executors were limited in the distributions they could make to beneficiaries under his will because they had to reserve sufficient funds to cover the entire *Less* claim of over $2.0 million (see note 28, *infra*) until it was resolved. The executors favored a prompt settlement so that the beneficiaries could be paid.

[7] Trial counsel, who had settled the *Less* case, was not engaged for the *Raab* case.

[8] Mr. Taber also personally authorized and directed the negotiations with Teledyne for the sale of the company's assets. App. 229-30.

stock was sold.[9] In May, 1975, Franklin Ness died. App. 336. Ness was counsel to Raab and dealt directly with McDonough during the negotiations for the sale of the Raab stock.[10] Further, most of Raab's associates at the company had died, retired, or moved away. App. 232.

After intensive efforts and consultations, defendants concluded that the passage of time had probably made it impossible to defend the case on the merits. It was evident from the record that the delay that had so prejudiced the defendants was attributable solely to the plaintiff.

A motion to dismiss was filed promptly. That motion was granted.

For the reasons set out below, the trial court's decision should be affirmed.

SUMMARY OF ARGUMENT

Plaintiff's action to prosecute this case over a period of more than seven years from May 10, 1967, when the complaint was filed, to June 3, 1974, when the case was finally tentatively scheduled for trial, consisted of: filing four notes of issue, taking one very short deposition, filing one incomplete pretrial statement, filing one motion that was later withdrawn, raising one objection, and attending seven pretrial conferences as required by the court. In the same time period plaintiff had twice faced dismissal and four times failed to comply with court orders intended to move the case on for trial. Cases involving far less delay and far more activity have been dismissed for failure to prosecute. *Eg., SEC* v. *Power Resources Corp.*, 495 F.2d 297, (10th Cir. 1974); *S & K Airport Drive-In, Inc.* v. *Paramount Film Distributing Corp.*, 58 F.R.D. 4 (E.D. Pa.), *aff'd sub nom., S & K*

[9] Mr. McDonough also personally negotiated the terms of the sale of the company's assets to Teledyne. App. 231-32.

[10] *See* App. 147.

Airport Drive-In, Inc. v. *Warner*, 491 F.2d 751 (3d Cir. 1973); *Sheaffer* v. *Warehouse Employees Union*, 408 F. 2d 204 (D.C. Cir.), *cert. denied*, 395 U.S. 934 (1969); *Russell* v. *Cunningham*, 233 F.2d 806 (9th Cir. 1956); *Shotkin* v. *Westinghouse Electric & Mfg. Co.*, 69 F.2d 825 (10th Cir. 1948).

Plaintiff's delay has caused irreparable injury to defendants because three key witnesses have died. These witnesses were three of the four participants in the transaction challenged in this action: Mr. Taber, the buyer; Mr. McDonough, the lawyer for the buyer; and Mr. Ness, the lawyer for the seller. Only Mr. Raab, the seller and the plaintiff in this action, remains alive to give his version of the facts, and Mr. Raab did not participate personally in any of the negotiations or the closing of the sale to defendants. All of those actions were handled for Mr. Raab by Mr. Ness. Mr. Taber and Mr. McDonough were also defendants' principal witnesses with respect to the dealings between Taber Instrument Corporation and Teledyne. Their testimony was essential to establishing: (1) that the facts with respect to Teledyne known at the time of the Raab transaction were insignificant and not material to the Raab transaction, and (2) that such facts were in any event, already known to Mr. Raab through his contacts with friends and colleagues at Taber Instrument Corporation. Without the testimony of Messrs. Taber and McDonough, defendants probably cannot prove these defenses. In similar circumstances, where even one key witness died, dismissal has been granted. *Drees* v. *Waldron*, 212 F. 93 (8th Cir. 1914); *Lamborn* v. *American Ship & Commerce Navigation Corp.*, 76 F.2d 363 (9th Cir.), *cert. denied*, 296 U.S. 581 (1935).

Plaintiff's arguments intended to overcome this very long delay of seven years and the incontestable hardship of losing three key witnesses are insubstantial. Plaintiff contends first that the delay was over by

1974 and that in 1974 and 1975 the action was prosecuted vigorously. This argument overlooks the facts that during this period plaintiff did not comply with four court orders intended to move the case on to trial, delayed for periods of one month to one year in taking five procedural steps that would have brought the case on to trial, and for one six-month period did nothing at all. However, even if plaintiff had engaged in constructive activity subsequent to the seven-year delay, the weight of the authority holds that subsequent activity cannot cure prior delay. *Sheaffer* v. *Local 730, Warehouse Employees Union*, 408 F.2d 204 (D.C. Cir.), *cert. denied*, 395 U.S. 935 (1969); *SEC* v. *Power Resources Corp.*, 495 F.2d 297 (10th Cir. 1974).

Plaintiff's second argument is that defendants waived their right to urge dismissal for failure to prosecute by taking actions themselves to move the case to trial prior to the time the motion to dismiss was made. There is simply no support in the case law or public policy for such a proposition. Moreover, the circumstances relied on by plaintiff occurred in the context of court orders with respect to the sequence of trial of this case and another case in which the same six lawyers were involved, and discovery requested by defendants in this case. Neither circumstance could be remotely construed as a waiver.

Plaintiff's third argument is that he was denied due process, and the trial court abused its discretion, by not holding an evidentiary hearing on either the motion to dismiss or the motion to vacate. This argument is frivolous. Plaintiff never requested an evidentiary hearing or the motion to dismiss, and there was no relevant, non-cumulative oral testimony that could have been heard in an evidentiary hearing on either motion. The procedure followed by the court below conformed to the requirements of Rule 43(e), F.R.C.P., was proper in these circumstances, and estops plaintiff from alleging this

procedural matter as a ground for appeal. *Bowman* v. *Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966); *Canvas Fabricators, Inc.* v. *William E. Hooper & Sons Co.*, 199 F.2d 485 (7th Cir. 1952); *Brotherhood of Railroad Trainmen* v. *Chicago, M. St. P. & P. R.R.*, 380 F.2d 605 (D.C. Cir.), *cert. denied*, 389 U.S. 933 (1967).

ARGUMENT

I. THERE IS AMPLE SUPPORT IN THE RECORD FOR THE FINDING BY THE COURT BELOW THAT PLAINTIFF FAILED TO PROSECUTE THIS ACTION.

Plaintiff's failure to prosecute this case is evident from the briefest perusal of the docket entries for the years 1967 through 1974. App. 2-3. There are only 20 such entries—fewer than three per year—which include filing the complaint, taking 14 actions in response to requirements of court orders or calendar rules (such as filing notes of issue, attending calendar calls and appearing at pretrial conferences), taking one very brief deposition (the transcript of which covers 27 pages) and filing two motions, one of which was subsequently withdrawn. *See* summary set out in Appendix B. That was all that plaintiff managed to accomplish in slightly more than seven years.

This section describes each of these actions claimed by plaintiff to have been taken to prosecute this case; examines the applicable case law under Rule 41(b); refutes plaintiff's argument that the record in this case should be considered in conjunction with the record in the *Less* case; and points out that even if it were, there would not be sufficient activity to meet the requirement of prosecution of this action.

A. Plaintiff Failed to Take the Required Affirmative Action to Prosecute This Action.

"Prosecution" of an action sufficient to withstand a challenge under Rule 41(b) requires affirmative action

initiated by the plaintiff to bring the case on to trial. The actions taken by plaintiff were principally in response to initiatives of the court in attempting to move the case on to trial.

1. ***The actions taken by plaintiff were infrequent, pro forma, passive responses to the court's efforts to move the case on for trial.***

The recital of the facts with respect to plaintiff's actions in this case is a tedious but necessary exercise. These facts are set out year-by-year below.

1967

The summons and complaint were served on all defendants by May 16, 1967. App. 13. All of the defendants answered promptly. App. 22-38. Five months after the last answer was served, on October 26, 1967, counsel for plaintiff filed a note of issue [11] indicating that the case was ready for trial, and requesting trial at the term beginning in November, 1967. App. 39-40.

1968

During the entire year of 1968, plaintiff did nothing except to file another note of issue on October 31, 1968,[12] this time requesting trial during the term beginning in November, 1968. App. 41-42.

1969

During the entire year of 1969, plaintiff did nothing. That year plaintiff did not even file a note of issue.

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[11] The note of issue was filed pursuant to Local Rule 12, as was required at that time to bring the case on for trial. Local Rule 12 was discontinued by the court in 1972.

[12] Local Rule 12 required that a new note of issue be filed for each term subsequent to the term in which the initial note of issue was filed.

1970

On February 6, 1970, the clerk of the court gave notice that an order of dismissal would be entered at the call of the dismissal calendar on March 13, 1970,[13] because no action whatsoever had been taken by the plaintiff in the preceding year. App. 43. At the call of the dismissal calendar, plaintiff's counsel appeared and stated that a notice of deposition had been served pursuant to which the deposition of Charles McDonough, counsel for four of the defendants, was scheduled.[14] The court was reluctant to permit the action to continue without assurance that it would be prosecuted with some diligence, and required a written report to be filed by June 12, 1970. App. 381. Plaintiff's counsel filed with the court a brief letter repeating the recital with respect to the McDonough deposition and stating:

> "The *Raab* suit is being actively and diligently prosecuted, and we will have both it and the *Less* suit brought on for trial at the earliest possible date." App. 434.

By order of the court dated June 26, 1970, the case was reinstated on the calendar. App. 52. A very brief deposition of McDonough was thereafter taken on July 13, 1970, the transcript of which covered only 27 pages. App. 55-80. On October 27, 1970, plaintiff's counsel again filed a note of issue indicating that the case was ready for trial and requesting trial during the term beginning in November, 1970. App. 82-83. No other action was taken.[15]

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[13] This action was taken pursuant to Local Rule 11 which provides that the clerk shall issue such a notice 30 days before the opening of each term if no action has been taken by the plaintiff for one year preceding.

[14] This deposition, scheduled for May 29, 1970, had already been adjourned to July 13, 1970. App. 381.

[15] Plaintiff's counsel also claim that they took action in August and September, 1970 to "prod" defendants into taking Raab's

1971

In 1971 plaintiff again missed the deadline for filing a note of issue and the court again took action looking to a dismissal for failure to prosecute. On March 2, 1971, plaintiff filed a motion for permission to file a note of issue *nunc pro tunc*. App. 85-88. That motion was granted. App. 84. On January 11, 1971, in an attempt to move the case on for trial, the court ordered the plaintiff to submit a detailed statement of facts, a statement of legal issues, a list of exhibits, a list of possible witnesses, and a list of depositions to be used at trial. App. 90. Plaintiff did not comply. At the first pretrial conference on April 2, 1971, plaintiff appeared and represented that it was necessary to take the deposition of three additional witnesses before the pretrial statement could be filed. App. 91-92. Plaintiff never thereafter took the deposition of any of those witnesses.[16] The court's order of April 6, 1971 required a pretrial statement to be filed not later than June 25, 1971.[17] Plaintiff did not comply. Later that year, on October 28, 1971, plaintiff filed another note of issue. App. 93-94.

1972

In 1972, the case was sent to the magistrate to complete pretrial proceedings. On July 13, 1972, the

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deposition. App. 382. However, this action was not taken to move the case on to trial. Raab was moving to the West Coast shortly and would have been required to incur the expense to travel back to Buffalo if defendants' counsel elected to take his deposition after his move. App. 435-36.

[16] Plaintiff's excuse for this failure is that the witnesses resisted being deposed in Buffalo so counsel would have had to travel to California for two of these depositions and bring one witness to Buffalo from Mexico. This resistance, although easily overcome, caused plaintiff to give up these discovery attempts, described to to court on an earlier occasion as important and essential. App. 249-53.

[17] This order also attempted to divest plaintiff of the authority to agree to postponement of its depositions because these postponements had previously caused substantial delay. App. 91-92.

plaintiff was again ordered to submit a statement of facts and lists of witnesses, exhibits and deposition testimony to be used at trial. App. 96. Again, plaintiff did not comply,[18] although counsel for plaintiff did appear at the second pretrial conference on August 17, 1972. App. 253. Plaintiff was again ordered to submit a pretrial statement at least three days prior to the pretrial conference scheduled for December 13, 1972. App. 98-99.

1973

That pretrial conference scheduled for December was postponed at plaintiff's request, then postponed again by the magistrate, and was finally held on February 7, 1973. App. 253-54. After the deadline had passed, plaintiff filed the required pretrial statement on February 5, 1973. App. 101-12. That statement did not comply with the very specific terms of the order.[19] The court followed up with a fourth pretrial conference on March 13, 1973. At this time it was pointed out that Ralph Taber had died and that plaintiff would have to substitute his executors as defendants. App. 255-56. The executors were appointed on July 3, 1973, but plaintiff did not move until some seven weeks later, on August 21, 1973, to substitute them as defendants. That motion was granted on September 11, 1973. R. Nos. 17, 18.[20] Plaintiff did nothing for the remainder of the year.

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[18] This time it was asserted that although plaintiff was finished with discovery, the pretrial statement was not submitted because defendants were not finished with discovery. App. 383. More likely, plaintiff's counsel simply failed to meet this deadline.

[19] The Pretrial Order contains six paragraphs stating the requirements to be met by the pretrial statement. App. 99. The plaintiff's pretrial statement failed to meet completely all but one of those paragraphs; and fails to make any attempt to meet two of those paragraphs. No joint statement of facts is provided and no statement setting forth efforts to arrive at a joint statement is provided as an alternative. No statement of exhibits is provided. No resume of the testimony of witnesses is provided. No memorandum dealing with legal problems is provided. App. 101-12. No excuse is offered for these deficiencies.

[20] References "R. No." are to numbered items in the Supplemental and Revised Index to Record on Appeal.

1974

On February 7, 1974, the court again took the initiative and held a fifth pretrial conference. App. 118, 258. Shortly thereafter, on February 14, 1974, plaintiff moved to consolidate the *Less* and *Raab* cases on the grounds that they involved similar issues of law and fact. App. 119-27. All defendants filed timely opposition to the motion, App. 128-30, 139-60, and plaintiff withdrew the motion before it was heard.[21] App. 281. Some time in February, 1974, plaintiff retained trial counsel. App. 437. On March 20, 1974, plaintiff raised an objection to the continued representation of three of the defendants by McDonough because he was to be a witness at trial.[22] App. 281. On April 29, 1974, the court held a sixth pretrial conference at which it sustained plaintiff's objection. App. 163. On June 3, 1974, the court held a seventh pretrial conference at which new trial counsel appeared for two of the three defendants previously represented by McDonough and the court ordered that the *Raab* case be deferred for trial until after the trial of the *Less* case. App. 164-66.

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[21] Plaintiff's counsel stated that the motion was withdrawn in order "to avoid any delay which its determination might have entailed." App. 136-37. That rationale is unsound in light of: (1) the amount of time to be saved if two cases could be resolved in one trial; and (2) the motion for separate trial of certain defenses filed subsequently on June 21, 1974 by plaintiff in the *Less* case and pursued despite any delay which its determination might have entailed. That motion was denied by the court. R. Nos. 128, 131.

[22] Plaintiff delayed over a year in raising this objection. The lists of proposed witnesses filed by the plaintiff in February, 1973, had disclosed that Mr. McDonough would be a witness at trial. App. 112. Plaintiff's objection to Mr. McDonough appearing as both witness and counsel at trial should have been raised, argued and decided at or shortly after the pretrial conference in February, 1973. The likely reason that this objection was not raised promptly was that the same list of proposed witnesses had disclosed that Messrs. Sweet and Murphy, local counsel for plaintiff, would be witnesses at the trial. Plaintiff delayed for a year, until February, 1974, in securing alternate trial counsel, and therefore, until after February, 1974 was not in a position to urge that Mr. McDonough be replaced.

From May 10, 1967 when the complaint was filed, to June 3, 1974, when the trial was finally tentatively scheduled by the court, a period of over seven years, the plaintiff had filed four notes of issue, taken one 27-page deposition, filed one incomplete pretrial statement, filed one motion that was later withdrawn, raised one objection, and attended seven pretrial conferences. Plaintiff had twice faced dismissal and four times failed to comply with court orders intended to move the case on for trial.[23] The trial court summed up:

> "On numerous occasions, the court urged plaintiff's counsel to prepare and warned that failure to prepare could result in dismissal. These warnings were ignored." App. 366.

Dismissal has been granted under Rule 41(b) in cases where the delay was far shorter, and the activity was far greater, than in this case. *Eg., S & K Airport Drive-In, Inc.* v. *Paramount Film Distributing Corp.*, 58 F.R.D. 4 (E.D. Pa.), *aff'd sub nom., S & K Airport Drive-In, Inc.* v. *Warner*, 491 F.2d 751 (3d. Cir. 1973) (seven year delay, some 2,200 pages of testimony taken in 32 depositions, dismissal granted); *Shotkin* v. *Westinghouse Electric & Manufacturing Co.*, 169 F.2d 825 (10th Cir. 1948) (four-year delay, a number of motions filed, dismissal granted); *Russell* v. *Cunningham*, 233 F.2d 806 (9th Cir. 1956) (delay of 15 months, relatively little action, dismissal granted); *SEC* v. *Power Resources Corp.*, 495 F.2d 297 (10th Cir. 1974) (three-year delay, substantial precomplaint investigation, dismissal granted).

2. *Rule 41(b) requires affirmative action taken at the initiative of the plaintiff to move the case on to trial.*

Plaintiff's counsel now argues that his readiness to try the case was asserted many times after the completion of

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[23] Plaintiff also failed to comply with three other orders in the *Raab* case after June 3, 1974. *See* p. 40, *infra*.

his discovery. Pl. Br. 27.[24] But a plaintiff cannot circumvent Rule 41(b) by announcing readiness and passively awaiting the day when the court, through review of its calendar, finally forces the parties to appear for trial. In this case, the most elementary affirmative action that should have been taken by the plaintiff was to request a trial date. Plaintiff's counsel appeared before the court at least *four times* between October, 1971, when plaintiff's discovery effort ended, and March, 1974, and *never asked for a trial date.*[25] It was not until March 20, 1974 that plaintiff ever made such a request. App. 281. A tentative trial date was set by the court promptly thereafter. App. 166.

Plaintiff's counsel is charged with the responsibility to take affirmative action to bring the case on for trial, and the knowledge that unless action is taken by counsel, a case may not come on for trial in the ordinary course of the court's business. The principle is stated with clarity in *Bendix Aviation Corp.* v. *Glass*, 32 F.R.D. 375, 377 (E.D. Pa. 1962), *aff'd*, 314 F.2d 944 (3d Cir.), *cert. denied*, 375 U.S. 817 (1963):

> "'[F]ailure to prosecute' under [Rule 41(b)] does not mean that the plaintiff must have taken any positive steps to delay the trial or prevent it from being reached by the operation of the regular machinery of the court. It is quite sufficient if he does nothing, knowing that until something is done there will be no trial."

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[24] References to "Pl. Br." are to the Brief of Plaintiff-Appellant filed May 20, 1976.

[25] Pretrial conferences were held on August 17, 1972, February 7, 1973, March 13, 1973, February 7, 1974. The first two of these conferences were before the magistrate.

It should be noted that plaintiff's last discovery was the deposition of McDonough on Oct. 1, 1970. Between that date and October 1971, plaintiff considered and abandoned further discovery attempts. The last activity of any sort with respect to attempted discovery occurred on October 15, 1971 when counsel attended a hearing. *See* Appendix A.

See also, Forest Nursery Co. v. *Crete Carrier Corp.*, 319 F. Supp. 213, 215 (E.D. Tenn. 1970) (Supp. Order); *cf. United States* v. *Certain Lands*, 282 F. Supp. 564, 570 (E.D. N.C. 1968).

Plaintiff cites seven cases in rebuttal on this point. Pl. Br. 28-29. All seven were listed, in the same bare fashion, in Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss. App. 302-03. All seven cases are distinguished readily,[26] as defendants pointed out in their Reply Memorandum in Support of Motion to Dismiss. App. 308-11.

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[26] One is distinguishable because it was dismissed on a different ground (failure to obey a court order rather than failure to prosecute). *Syracuse Broadcasting Corp.* v. *Newhouse*, 271 F.2d 910 (2d Cir. 1959). The second is distinguishable because it was not decided under Rule 41(b) at all. *Meeker* v. *Rizley*, 324 F.2d 269 (10th Cir. 1963). The third is a per curiam opinion apparently decided on a ground applicable only to defendants who are not served with process promptly, a precedent not relevant here. *Lyford* v. *Carter*, 274 F.2d 815 (2d Cir. 1960). The fourth is a citation to a 1959 opinion in *Bendix Aviation Corp.* v. *Glass*, 176 F. Supp. 374 (E.D. Pa. 1959), without also citing a later opinion in the same case dismissing the action for failure to prosecute and pointing out that the defendant's inaction is irrelevant because the responsibility for bringing the case to trial lies squarely with the plaintiff. *Bendix Aviation* v. *Glass*, 32 F.R.D. 375, 378 (E.D. Pa. 1962), *aff'd*, 314 F.2d 944 (3d Cir.), *cert. denied*, 375 U.S. 817 (1963). The fifth involved a counterclaim by the defendant that the court found to be an entirely separate and distinct lawsuit that defendant had failed to prosecute, *Tinnerman Products, Inc.* v. *George K. Garrett Co.*, 22 F.R.D. 56 (E.D. Pa. 1958), and arises in a jurisdiction where there is substantial authority that the defendant has no responsibility to move a case on to trial. *S & K Airport Drive-In* v. *Paramount Film Dist. Corp.*, 58 F.R.D. 4, 7 (E.D. Pa.), *aff'd sub nom., S & K Airport Drive-In, Inc.* v. *Warner*, 491 F.2d 751 (3d Cir. 1973); *Bendix Aviation* v. *Glass, supra.* The sixth and seventh involve highly unusual fact situations. *International Harvester Co.* v. *Rockwell Spring & Axle Co.*, 339 F.2d 949 (7th Cir. 1964) (plaintiff awaiting decision of a case that could moot all issues in the pending case); *Rankin* v. *Shayne Bros.*, 280 F.2d 55 (D.C. Cir. 1960) (plaintiff's attorney became ill and discontinued his practice and plaintiff himself was so ill during period of delay he could not have participated in the trial). *See* App. 308-11 for a fuller discussion of these cases.

Plaintiff's counsel may have been ready to try the case in October, 1971, when the fifth note of issue was filed. Pl. Br. 27. He may even have been ready to try the case in October, 1967, when the first note of issue was filed (which he now denies, App. 343). But regardless of when counsel stood ready to try the case, he *did* nothing to move the case on to trial and thereby failed to prosecute his action. For that reason, defendant's motion to dismiss under Rule 41(b) for failure to prosecute was properly granted.

B. The Record in This Case Should Be Considered Standing Alone for Purposes of Determining Whether Plaintiff Failed to Prosecute.

With the abysmal record in this case, it is understandable why plaintiff now asserts that the record in this case should be viewed in conjunction with the record in the *Less* case, which shows some, but not much more, activity during the relevant period. The *Less* case involved a different plaintiff, a different transaction, and different circumstances surrounding the transaction.[27] The principal common factor between the two cases is that the same counsel represented both plaintiffs.

Plaintiff advances three theories as to why the records in the two cases should be considered together: (1) the "lead case" theory; (2) the "companion case" theory and (3) the "common discovery" theory. None of these has any basis in the record, or overcomes the differences in the cases that required separate trials.

1. The "lead case" theory.

Plaintiff asserts that the *Less* case was regarded by the court and all counsel as the "lead" case, to be settled or tried first, and that, for this reason, plaintiff was relieved of any responsibility to prosecute the *Raab* action as long as the *Less* action remained on the calendar.

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[27] Those differences are set out in detail in defendants' Memorandum in Opposition to Motion for Consolidation, App. 149-54. The motion was thereafter withdrawn.

Pl. Br. 21-22, 32. Although plaintiff's argument consistently tries to merge the settlement and trial aspects of this theory into an overarching agreement by all concerned, the facts are otherwise.

(a) *settlement*

The most important fact about the so-called settlement aspects of either of these cases is the absence of meaningful settlement negotiations from 1967 through June, 1974. At each of the seven pretrial conferences held in the *Raab* and *Less* cases from April, 1971 through June, 1974, the court or the magistrate inquired about the possibility of settlement. As the *Less* case was alleged by plaintiff to be worth from $1.4 million to $2.2 million, and the *Raab* case was alleged by plaintiff to be worth only from $30,000 to $60,000,[28] these efforts by the court apparently focused on the larger case as the more difficult problem. The discussions reported by counsel for plaintiff may be correct. Pl. Br. 6-7, 22. Since Mr. McDonough is now deceased, defendants have no way of refuting these reports. But the presence of *pro forma* settlement discussions sponsored by the court in this case, the *Less* case, or any other case does not

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[28] Less owned 14,100 shares. If Less had held those shares at the time of the sale of the company's assets to Teledyne, he would have been entitled to receive the equivalent of $50 per share in Teledyne (shares worth $705,000). The Teledyne shares to be distributed to the Taber Instrument Corporation shareholders were available for distribution on December 30, 1966, but they were not in fact distributed until May, 1967. By that time the price of the Teledyne shares had doubled, and each Taber Instrument Corporation shareholder received the equivalent of $100 per share in Teledyne shares. If he had held his shares at this time, Less would have received $1,410,000. By November, 1967, the Teledyne stock had again increased in price and if Less had sold the Teledyne shares he would have received for his Taber Instrument Corporation shares at that time, he would have realized $2,215,000.

The various allegations with respect to damages made by the plaintiffs in the *Raab* case were based on the same calculations as had been made in the *Less* case.

relieve plaintiff of his responsibility to prosecute his action or face dismissal.

(b) *trial*

Plaintiff now makes much of the agreement of counsel that the *Less* case would be tri l first and the *Raab* case would be scheduled for trial hereafter. As counsel for plaintiffs and defendants w re the same lawyers in both the *Raab* and *Less* cases, and both cases were pending before the same judge, it was obvious that the two cases could not be tried simul.aneously. The first suggestion as to which case should be tried first came in a letter to the court from counsel for plaintiffs in both cases dated March 20, 1974, App. 281. Counsel for defendants did not object to plaintiff's suggestion, and the court ordered that the *Less* case be tried first. There was no compelling reason for this decision. Indeed, some defendants believed that it made more sense to try the *Raab* case first. The *Raab* case was, by all accounts, the simpler case. There was no cross-claim, as there was in *Less*. The company's claim for malfeasance was much simpler and more direct in *Raab* than in *Less*.[29] The Raab sale occurred slightly closer to the Teledyne sale so that if the company defeated Raab's claims it would also defeat Less' claims, whereas if the company prevailed over Less, Raab could claim his case was still viable because his sale occurred later. The defendants who were of the view that the *Raab* case should be tried first deferred and no objection was raised.

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[29] Raab was accused of converting company property and money to his own use. Less was accused of converting company property as well as using company time and materials to work on personal projects, sponsoring a competing business while on the company payroll and theft of trade secrets. There were approximately four witnesses that would be called in establishing the company claims against Raab. App. 179-80. There were 10 or more who might be called to establish the company's claim against Less. App. 573-84, 141-44.

The tentative trial date in the *Less* case was set for October 15, 1974. App. 166. From June through October, 1974, counsel for all parties concentrated on settlement and preparation of that case. During this period, the initiative for settlement discussions came primarily from the parties, although several pretrial conferences devoted to this subject were held by the court. When the *Less* case was settled in November, 1974, the parties then turned their attention to the *Raab* case. When it became apparent that the *Raab* case could not be settled, counsel for defendants resumed trial preparation. As a part of that preparation, additional discovery was requested. It was in this context that, at the pretrial conference on March 19, 1975, counsel for one of the defendants stated:

> "This was a case that was tagging along with the *Less* case. Everyone's attention was focused [*sic*] on the *Less* case. There is very little discovery in this [the *Raab*] case." App. 178.

and the court stated:

> "The other thing is this, the present counsel got in the case at a late date, certainly, and also in this case everyone agreed that this case should follow along after the *Less* case." App. 178.

Plaintiff relied on these statements in support of its motion to vacate the judgment of dismissal, App. 378-79, and cites them again in its brief before this court, Pl.Br. 13-14, 23-24, hoping, by taking these remarks out of context, that some agreement relating back to 1967 can be shown. In fact, these remarks relate back only to June, 1974, when plaintiff's delay in prosecuting the *Raab* case was already established, and refer only to the agreement on order of trial. *See* affidavits submitted by all other counsel, App. 327, 494, 505, 510, 514, and 518. Establishment of the order of trial in June, 1974, does not relieve plaintiff of the consequences of the delay from May, 1967 to June, 1974 during which no action was taken to prosecute this action.

2. *The "companion case" theory.*

Plaintiff also asserts that the *Less* and *Raab* cases were regarded as "companion cases" by the court and all counsel, and therefore any action taken to prosecute the *Less* action should be taken as an action to prosecute the *Raab* action. Pl.Br. 5, 21-22, 29, 32. Counsel for all defendants denied that the cases were regarded as companions by anyone but plaintiff. App. 494, 503, 508, 513-14, 518.

Plaintiff's assertion is based on common captioning of some pleadings and common scheduling of pretrial conferences. Neither of these bases has any substance.

There were 40 pleadings or other papers filed by the parties or the court (excluding the deposition transcripts) in the *Raab* case through June 3, 1974 when the *Less* case was set for trial and the *Raab* case was held over for trial after completion of the *Less* trial. There were 66 pleadings or other papers (excluding the deposition transcripts) filed in the *Less* action during that same time period. Of these, 12 were jointly captioned in both the *Less* and the *Raab* cases. Among the jointly captioned items are four pretrial notices and orders, three pretrial statements of the parties, and five papers filed in connection with a motion to consolidate the two cases.

The court scheduled seven pretrial conferences in the *Less* and *Raab* matters between May, 1967 and June, 1974. In each instance, both matters were scheduled on the same date and at the same time (although only three of the seven notices with respect to these pretrial conferences are jointly captioned).

Plaintiff now argues that this joint captioning and joint scheduling supports its contention that any action taken to prosecute the *Less* case should be taken as an action to prosecute the *Raab* case. Pl.Br. 22. However, the bulk of these instances occurred when the court acted

to expedite its calendar. Counsel for each of the parties, except one,[30] in the *Less* action was also counsel for the same party in the *Raab* action. Since counsel would be present to discuss one action with the court, it was plainly efficient to schedule a discussion of the other action at the same time.

Counsel for plaintiff had two opportunities to litigate the "companion case" theory, and backed away from each.[31] This reluctance to test this theory directly controverts the confidence with which the argument is now advanced.

3. *The "common discovery" theory.*

Plaintiff asserts that all of the discovery taken in the *Less* action was equally applicable to the *Raab* action because it was an attempt to get at the facts surrounding the transaction between the Taber Instrument Corporation and Teledyne, Inc. which was common to both actions. Pl. Br. 21-22.

Plaintiff's counsel took the depositions of only eight persons in the *Less* case and one person in the *Raab* case.[32] The last of those depositions was taken in 1970.

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[30] Mr. Boreanaz, counsel for defendant Irvin Himmelfarb, appeared only in the *Less* case. Mr. Himmelfarb was not a defendant in the *Raab* case.

[31] On February 14, 1974, plaintiff's counsel filed a Notice of Motion for Consolidation with a supporting affidavit. Defendants responded forcefully, contending that there were no common issues of fact or law. App. 139-60. Plaintiff withdrew the motion. App. 137.

At the March 19, 1975 pretrial conference the defendants expressed their view that the deposition transcripts taken in the *Less* case could not be used in the *Raab* case because the two cases were not sufficiently related. Plaintiff's counsel challenged that assertion and stated that a motion would be filed so that the issue could be litigated. The court directed that this motion be made in a timely fashion. App. 181-82. The motion was never filed.

[32] They deposed each of the named defendants, two lawyers who had represented various of the defendants in the relevant transactions, an officer of Teledyne and a bank officer who approved a loan to one of the defendants. The single deposition taken in the *Raab*

All of the other depositions had been completed by October, 1969. Each transcript is captioned in a single case. Plaintiff now argues that, despite the absence of notice of any kind opposing counsel, there was an understanding that each deposition was in fact being taken in both cases. The defendants deny any such understanding. App. 504, 507. Mr. McDonough cannot testify as to his understanding, but nothing in his notes or papers supports plaintiff's contention. App. 327.

It is likely that the "common discovery" theory was formulated in 1973, after Ralph Taber died, rather than in 1967, 1968, and 1969 when these depositions were taken. Because plaintiff had not taken Ralph Taber's deposition in the *Raab* case, when Taber died the only source of his testimony was the deposition taken in the *Less* case. The "common discovery" theory arose out of the difficulties of proof that would arise in the *Raab* case without Taber's testimony.[33] Before Taber's death, some documents were marked as exhibits in both the *Less* case and the *Raab* case, indicating an intent to make a separate record in each case.[34] This had added significance because these documents are part of what plaintiff calls the "common portion" of the cases, the transaction with Teledyne.

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case was of one of the lawyers who had already been deposed in the *Less* case.

[33] The difficulty of trying this case after the passage of so many years is not limited to defendant's side of the case. Since the deaths of Messrs. McDonough, Taber, and Ness, there is no foundation that can be provided for many of the exhibits listed by plaintiff. App. 411-22. These documents were typically identified by title in the depositions but none of the facts necessary for proper authentication or foundation were elicited.

[34] *E.g.* the Taber Instrument Corporation stock record book is Plaintiff's Exhibit 4 in the *Raab* case, and Plaintiff's Exhibit 45 in the *Less* case; a letter from Kaufman to McDonough (June 20, 1966) is Plaintiff's Exhibit 6 in the *Raab* case and Plaintiff's Exhibit 107 in the *Less* case.

Plaintiff's counsel cannot now rely on his hopes or undisclosed intentions with respect to the discovery to support an argument that he was fulfilling his responsibility to prosecute the *Raab* case by taking some action in the *Less* case.[35]

C. Even if Counsel's Actions in Both Cases Are Considered, the Dismissal for Failure to Prosecute Is Justified.

Counsel for plaintiff filed eight lengthy affidavits covering 152 pages of the record detailing the actions taken to prosecute the *Less* case, claimed to be relevant to the *Raab* case, including telephone calls, and memoranda to the file.[36] Taking into account every single action alleged by plaintiff to be relevant, there was not sufficient affirmative action taken over the seven-year period from May 10, 1967 when the complaint was filed, to June 3, 1974, when a tentative trial date was set, to escape dismissal under Rule 41(b).

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[35] Dismissal is available under Rule 41(b) even when extensive discovery has taken place, if the plaintiff does not diligently prosecute his action after completing discovery. In *S & K Airport Drive-In, Inc.* v. *Paramount Film Dist. Corp.*, 58 F.R.D. 4 (E.D. Pa.), *aff'd sub nom., S & K Airport Drive-In, Inc.* v. *Warner*, 491 F.2d 751 (3d Cir. 1973), some 2,200 pages of testimony were taken in 32 depositions. However, after discovery was completed, plaintiff did nothing to move the case on to trial and the motion to dismiss under Rule 41(b) was granted.

[36] Affidavit of David L. Sweet in Opposition to Motion to Dismiss (29 pages with 10 attachments) App. 243-86; Affidavit of James P. Heffernan in Opposition to Motion to Dismiss (3 pages with 8 attachments), App. 287-98; Supplemental Affidavit of David L. Sweet in Opposition to Defendants' Motion to Dismiss (8 pages with 2 attachments) App. 330-40; Supplemental Affidavit of James P. Heffernan in Opposition to Defendants' Motion to Dismiss (5 pages) App. 341-46; Affidavit of David L. Sweet in Support of Motion for an Order Vacating Judgment of Dismissal) (18 pages with 7 attachments) App. 376-428; Affidavit of James P. Heffernan in Support of Motion for an Order Vacating Judgment of Dismissal (4 pages with 3 attachments), App. 429-36; Affidavit of David E. Montgomery in Support of Motion for an Order Vacating Judgment of Dismissal (2 pages) App. 437-38; Supplemental Affidavit of David L. Sweet in Support of Motion to Set Aside Judgment of Dismissal (9 pages with 7 attachments) App. 529-51.

Each of the additional actions in the *Less* case referred to by counsel for plaintiff in their eight affidavits and the 39 documents attached thereto is set out in Appendix A. There are 35 such items. Plaintiff claims that these 35 items should be added to the 20 items of activity described in Section A above, which have been summarized in similar fashion in Appendix B, and that, so combined, the activities in the two cases are sufficient to survive a challenge under Rule 41(b).

One simple measure of the diligence with which plaintiff pursued this case, taking the position most favorable to plaintiff, is that in only 47 (or 13%) of the 368 weeks between May 8, 1967 and June 3, 1974 did plaintiff take *any* action claimed in *any* affidavit filed by plaintiff [37] to be significant to the prosecution of *either* case. In 87% of these weeks, plaintiff did nothing at all.

That is the version *most* favorable to plaintiff. In fact, the percentage of weeks in which plaintiff did nothing is substantially higher than 87%. If one excludes the 10 items [38] that are actions taken to attend calendar calls or pretrial conferences as required by the court, the percentage climbs to 90%. If one further excludes the six items that plainly are relevant only to the *Less* case because they involve only defendant Himmelfarb who was *not* a party to the *Raab* case (or his counsel, Mr. Boreanaz),[39] the percentage rises again to 92%.

Defendants contend, as set out above in Section A, that only affirmative actions looking to trial of the case should

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[37] This analysis assumes that each of the items for which plaintiff provided no date falls in a week in which no other item of activity was undertaken.

Some of the individual items listed by plaintiff fall into the same week.

[38] Items 7 and 10 in Appendix A; items 4, 9, 10, 12, 13, 15, 18 and 19 in Appendix B.

[39] Items 22, 23, 28, 29, 30 and 31 in Appendix A.

be taken into account in assessing whether plaintiff has failed to prosecute his action. Under that standard, only 26 actions taken by plaintiff [40] (including filing the complaint) would qualify, and plaintiff has been idle in 93% of the weeks from the time the complaint was filed in May, 1967 to time a tentative trial date was set in June, 1974.

Therefore, even if counsel's actions in both cases are considered, dismissal is justified.[41]

II. THE DELAY IN REACHING TRIAL OF THIS CASE HAS IRREPARABLY INJURED DEFENDANTS AND NO PART OF THAT DELAY IS ATTRIBUTABLE TO DEFENDANTS.

The court below held that irreparable injury to the defendants was an independent ground on which the motion to dismiss could be granted. There is extensive support in the record for this finding. Plaintiff's rebuttal is (1) an assertion that because the depositions of defendants' witnesses Messrs. Taber and McDonough, were taken by plaintiff, their testimony has been preserved in a form adequate for defendants' purposes; and (2) an assertion that defendants are equally responsible for delay and are, therefore, ineligible for "equitable" relief. Those assertions are without foundation in the record.

A. Plaintiff's Delay Caused Irreparable Injury to Defendants.

Defendants have essentially two defenses to the allegations of plaintiff's complaint: (1) there was no omission to state a material fact because the facts alleged by plaintiff never existed; and (2) if there were an omis-

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[40] Items 1, 2, 3, 4, 5, 6, 8, 9, 12, 13, 14, 19, 24, 26, 27, 35 in Appendix A; and Items 1, 2, 3, 6, 7, 8, 11, 14, 16, 17 in Appendix B.

[41] If counsel's actions in the *Raab* case alone are considered, under the standard urged by defendants, plaintiff was idle in 98% of these weeks. *See* reference to Appendix B in note 40 *supra*.

sion to state any relevant facts, it was harmless because plaintiff knew the facts from other sources and did not rely on defendants' omission. Both defenses require oral testimony that is no longer available.

1. *Defense of no omission to state a material fact.*

Plaintiff's complaint alleges that defendants failed to state that active negotiations had taken place between Teledyne and Taber Instrument Corporation, and that an agreement in principle on the sale of Taber Instrument Corporation had been reached prior to the time that Raab sold his stock.

There were only five participants in the transaction between Teledyne and Taber Instrument Corporation—the principals, Taber and Singleton; their lawyers, McDonough and Kaufman; and the middleman, D'Angelo. These are the only sources of direct evidence with respect to plaintiff's contentions. App. 233.

Plaintiff could offer the following circumstantial evidence to establish the existence of "active negotiations" and an "agreement in principle":

- a meeting between Singleton, Taber and D'Angelo in California in January, 1966;
- one or more contacts between Singleton and D'Angelo in February and March, 1966;
- a visit by Singleton to the Taber Instrument Corporation plant in March or April of 1966;
- one or more contacts between Singleton and D'Angelo; and one or more contacts between D'Angelo and Taber in April and May, 1966;
- a draft contract sent by Kaufman (on behalf of Singleton) to Taber in May, 1966;
- some correspondence between Taber and McDonough and Singleton and Kaufman in May and June, 1966; and
- a meeting between Singleton, Kaufman, Taber and McDonough in Buffalo in June, 1966.

Plaintiff would argue that the inference from these contacts is that substantial negotiations had taken place, and that an agreement in principle had been reached.

The only person who could testify for defendants that whatever discussions had taken place were indeed not substantial negotiations is Taber himself.[42] Only Taber could testify to the sense of personal satisfaction in having the chairman of the board of an industrial giant like Teledyne take a personal interest in his corporation, and the sense of curiosity about what his corporation was worth on the current market that led to the initial informal discussions between the two men. Only Taber could testify that he was not actively negotiating to sell his company to Teledyne, that he had rejected the Teledyne overtures prior to the date on which the Raab negotiations were concluded; and that he did not intend to sell his company when he approved the purchase of Raab's few shares of stock.

None of these facts, vital to the defense, is available from the transcript of the Taber deposition. That deposition referred only to the *Less* case. Raab's name is nowhere mentioned in the 251 pages of transcript. R. Nos. 62, 63, 64. Taber responded to the questions of plaintiff's counsel with very limited answers and the questioning was generally hostile. There was no cross-examination to draw out information useful to the defense. There was no purpose to be served by such cross-examination at the time, because Taber was available to testify at the trial.

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[42] Presumably Singleton and Kaufman could testify as to their version of the contacts and whether they thought the negotiations were getting anywhere at this early stage, but they could not testify as to Taber's intent to sell. Their testimony must be presumed to be adverse to plaintiff's case. Plaintiff's counsel acknowledges that he discussed with Kaufman and other Teledyne officers the possibility of deposing Singleton and Kaufman. App. 250. It is unlikely that such a discussion occurred without reference to the substance of the testimony that might be elicited. Thereafter plaintiff abandoned attempts to take these depositions. App. 253.

Taber's health appeared to have improved after his retirement. Defendants had no indication that Taber might become unavailable in the immediate future and therefore had no occasion to perpetuate his testimony in a new deposition. Taber's health deteriorated rapidly in early 1973 and he died on February 16, 1973. Thus defendants are now left with a cold transcript in another case in which only the information called for by plaintiff is set forth. The prejudice to defendants and the severe handicap to the defense is readily apparent.

One possible alternative source of testimony for defendants was McDonough who represented Taber and the Taber Instrument Corporation in both the transaction with Raab and the transaction with Teledyne. McDonough refused to disclose the substance of his conversations with Taber when he was deposed, and plaintiff never moved to compel this disclosure.[43] At trial, had Taber and the corporation waived the attorney-client privilege, McDonough could have supplied testimony to support Taber's version of the facts. He could have testified that Taber was not interested in the exploratory offer made by Teledyne and did not even bother to send the draft contract to him until some weeks after it arrived from Teledyne's lawyers. He could have testified as to Taber's instructions with respect to the Teledyne matter and as to the entirely separate set of circumstances out of which the Raab transactions arose. McDonough had represented the corporation in all of the various pension fund claims by former employees and was familiar with Taber's purpose in retrieving stock in his company from those employees who had allegedly been converting the corporation's money and property to their own personal benefit. The pension fund claims were a lever for retrieving that stock and repurchase of the stock was an integral part of the settlement of those claims.

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[43] R. Nos. 74-76. It should be noted that plaintiff never used any other form of discovery such as contention interrogatories or requests for admissions to get at this information.

No one other than Taber and McDonough took part in those plans to retrieve the company's stock. There is no other source of evidence with respect to this part of the defendants' defense, now that both Taber and McDonough are dead.

In *Drees* v. *Waldron*, 212 F. 93 (8th Cir. 1914), the original defendant died during a seven-year delay caused by plaintiff. The court discussed at length the effect of this loss on the ability to maintain a defense:

> "It is sufficient upon this point that within reasonable probabilities based upon human experience there will be highly material matters as to which Armstrong's [the deceased defendant] testimony will be important. It is also urged by counsel that the facts provable by Armstrong could be established by other witnesses. Perhaps so, perhaps not. Whether this would be true or not could be disclosed only by the trial and must remain uncertain until then. Viewing the matter also from the standpoint of human probabilities, however, we are impressed with this fact: Armstrong were he alive would undoubtedly know as to these various matters, he was the actor in them, his absence relegates the respondents to the recollection of third parties or of persons only secondarily interested, a recollection necessarily affected by the seven or more intervening years. On the other hand, had this application been brought seasonably to hearing, the necessity upon respondents to seek their testimony from uncertain and secondary sources would not have existed. To countenance this delay is in our judgment to impose an unjust and unfair disadvantage upon one of the parties and this we cannot do." 212 F. at 96.

In a similar case, *Lamborn* v. *American Ship & Commerce Navigation Corp.*, 76 F. 2d 363 (9th Cir.), *cert. denied*, 296 U.S. 581 (1935), the court observed:

> "If by the laches and delay of the complainant it has become doubtful whether adverse parties can command the evidence necessary to a fair presenta-

> tion of the case on their part, as, for instance, where parties interested and witnesses have died in the interim, or if it appears that they have been deprived of any advantages they might have had if the claim had been seasonably insisted on, or if they be subjected to any hardship that might have been avoided by reasonably prompt proceedings, a court of equity will not interfere to give relief . . . . " 76 F.2d at p. 367.

Plaintiff's delay is solely responsible for the loss to the defendants of the testimony of Taber and McDonough and the hardship imposed on defendants with respect to their defense is readily apparent.

2. *Defense of no reliance.*

There had been numerous offers to buy the Taber Instrument Corporation from many different sources during the five years that preceded the sale to Teledyne. Taber was justifiably proud of the interest in the company he had built from scratch over a period of 25 years, App. 235, and often discussed these offers with his senior management employees. The existence of these offers and Taber's uniform rejection of them was well-known to many company employees.

Raab was one of the senior management employees of the corporation from 1954 through February, 1965. He supervised a large number of employees and was personally acquainted with all of the other managers. While employed by the company, Raab became aware of a number of offers from various prospective purchasers. After Raab's departure from the corporation, he kept in touch with a number of employees and former employees of the corporation. Through them he learned of Dr. Singleton's visit to the Taber plant in March, 1966, and of Teledyne's interest in purchasing the corporation. However, because of Taber's uniform rejection of such offers in the past, Raab discounted any possibility that Taber would sell his company.

Raab's lack of reliance on any omission by Taber or McDonough to disclose the fact of the Singleton visit and the prior and subsequent contacts between Taber Instrument Corporation and Teledyne is a defense available to all of the defendants. However, the passage of time and plaintiff's delay have caused the loss of defendants' evidence with respect to this defense as well. Senior and other employees of the Taber Instrument Corporation with whom Raab had contact in 1966 have died, retired, left their employment and moved away. Those who are still alive cannot now be located from Teledyne's records, and their whereabouts are unknown to defendants. Even if they could be located, the intervening years have inevitably dimmed memories and substantially impaired the ability to present firm and convincing testimony.

Defendants need not do more than show their need for the testimony from these witnesses. Where there is unreasonable delay, there is a presumption of injury to defendants' defenses. *Alexander* v. *Pacific Maritime Association*, 434 F. 2d 281, 283 (9th Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971); *States Steamship Co.* v. *Philippine Air Lines*, 426 F. 2d 803, 804 (9th Cir. 1970); *Pearson* v. *Dennison*, 353 F. 2d 24, 28 (9th Cir. 1965); *Bernays* v. *Frederic Leyland & Co.*, 228 F. 913, 914 (D. Mass. 1915).

B. No Delay Is Attributable to Defendants.

The trial court found:

> "In the *Raab* case, the defendants have always asserted their readiness for trial. At times they sought adjournments of depositions from the plaintiff, but the plaintiff agreed to this procedure and took no steps to hasten discovery. *The defendants never delayed proceedings before this court.*" App. 366 (emphasis added)

Plaintiff challenges that finding and points to three alleged delays by defendants: (1) the appointment of executors for the estate of Ralph Taber; (2) the resolution of the problem arising out of the joint rep-

resentation of the estate and defendant D'Angelo; and (3) the resolution of the problem arising out of the representation of three of the defendants by a lawyer who was to be a witness at trial.[44] These allegations are without substance. Individually and collectively the amount of time involved is very small in comparison with the period during which the case had been pending. The delay attributable to the first item was not within the control of either of the parties; the second was acquiesced in by plaintiff and the third was caused by plaintiff.

1. *Appointment of executors.*

After Ralph Taber died on February 16, 1973, it was necessary to substitute the executors as parties to the action. Before plaintiff could take action to do that, the executors had to be appointed. That was not completed until July 3, 1973, about 19 weeks after Taber's death. Plaintiff characterizes this time period as a delay attributable to defendants because the lawyer for the estate at that time was William Bain, a partner of Robert M. Hitchcock who represented Joseph D'Angelo, one of the defendants in the *Raab* action. In fact, there is no evidence that this process was in the control of the defendants, and in any case, some time was necessary to install the executors and the amount of time actually required was not unusually long. Plaintiff's counsel was informed promptly after the executors were appointed, App. 256, but there was no concern by plaintiff about any potential delay at this time. It took five weeks from the time counsel was informed of the appointment of the executors for plaintiff's pro forma motion to substitute the executors to be filed. R. No. 17.

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[44] Plaintiff makes passing references to two other so-called "delays": an extension of time for one month with respect to the trial date in the *Less* case, and an extension of time for one month to complete discovery in the *Raab* case. Pl. Br. 12-13. On both these occasions defendants applied to the court for an extension of time and the application was granted for good cause shown. No such instance can be cited as a "delay."

2. Joint representation of two defendants.

Prior to his death. Ralph Taber had been represented by Charles McDonough, who also represented Taber Instrument Corporation and its other two directors, Manasen and Hildebrandt. Taber's estate was represented by a different lawyer, therefore, after Taber's death, representation of his interest in this action changed hands. However, the law firm that represented the estate also represented D'Angelo, one of the other defendants. There was a conflict of interest between the estate and D'Angelo because Taber and the other three defendants represented by McDonough had a crossclaim against D'Angelo. Alternate representation had to be secured either for D'Angelo or the executors.

Plaintiff alleges that the conflict of interest was known at the time of the appointment of the executors in July, 1973, and was not resolved until February, 1974, some eight months later, when substitute counsel entered an appearance for the executors. App. 131. This attempt to fix responsibility for delay on defendants is unsuccessful. At any time after the executors had been appointed, plaintiff could have resumed prosecution of the action and the executors would have had to respond or secure an extension of time. Plaintiff did nothing.

3. Representation by a lawyer-witness.

At the pretrial conference on April 29, 1974, the court directed that substitute counsel be found for the three defendants still represented by McDonough because it was evident that McDonough would be a witness at trial and plaintiff's counsel objected to this dual role. A follow-up pretrial conference was scheduled for June 3, 1974, some five weeks later. At this time, substitute counsel had been retained by defendants Manasen and Hildebrandt. But no substitute counsel had been found for defendant Taber Instrument Corporation. Finding counsel for the corporation proved to be a difficult problem. The corporation was essentially without funds to

employ counsel and without any officers, directors or shareholders who could direct its affairs and instruct counsel.[45]

At the June 3, 1974 conference, counsel for defendants suggested the appointment of a receiver for the corporation who would be empowered to employ counsel, and counsel for defendants Cindy Taber and the Marine Midland Bank-Western, the executors, volunteered to take on the representation. It was asserted that there was no conflict of interest because the executors' predecessor in interest, Mr. Taber, had been represented by the same counsel as represented the corporation. Tr. 8, 14. Counsel for plaintiff agreed tentatively to this procedure, Tr. 18, but requested some time to think it over. Tr. 27. At the pretrial conference on June 24, 1974, the representation of the corporation was discussed again. Although he had had several weeks to consider the problem, counsel for plaintiff objected to any action by the court to appoint a receiver without a memorandum of points and authorities prepared prior to that time for his inspection. Tr. 43-44, 49. No other party objected. On July 24, 1974, the court issued an order appointing a receiver and the receiver thereafter retained present counsel. R. No. 25.

Several points can be made with respect to the delay alleged by plaintiff to have been caused by defendants: (a) plaintiff knew of the necessity to substitute counsel in February, 1973 (because their pretrial statement iden-

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[45] At the time of the sale to Teledyne, all of the shareholders of the Taber Instrument Corporation gave up their shares and received Teledyne shares in exchange. All of the Taber Instrument Corporation's assets were transferred to Teledyne, except for a small fund to be used to wind up Taber Instrument Corporation's affairs. Three of the directors, Taber, Manasen and Hildebrandt, continued in office to perform those functions. Subsequently, Taber died and Manasen and Hildebrandt resigned. That left the corporation with no directors or shareholders who could take charge of its affairs. The funds for winding up the corporation's affairs had been largely used or obligated in the course of other litigation that was pending at the time of the sale. Tr. 20-22.

tified McDonough as a witness) and did nothing until March, 1974, over a year later, when their objection to McDonough's continued representation of defendants was raised in a letter to the court.[46] App. 137; (b) the five-week period from the pretrial conference on April 29, 1974 to the next pretrial conference on June 3, 1974 was not an unreasonable amount of time for defendants to secure new counsel pursuant to an order of the court; (c) the entire matter of representation of the Taber Instrument Corporation could have been resolved on June 3, 1974 but for the objections of plaintiff which turned out to be completely frivolous; and (d) no delay after June 3, 1974 in securing counsel for the corporation affected the trial date, which remained set at October 16, 1974.

III. DEFENDANTS' MOTION TO DISMISS WAS TIMELY MADE AND DEFENDANTS HAVE NOT WAIVED ANY RIGHT TO PURSUE DISMISSAL FOR PLAINTIFF'S FAILURE TO PROSECUTE.

Plaintiff's argument with respect to timeliness is somewhat unfocused and obscure, but it appears to rely on two principal contentions: (A) that plaintiff had "cured" the delay by subsequent actions moving the case forward to trial; and (B) that defendants had waived their right to urge dismissal for failure to prosecute by certain actions they took to move the case forward to trial. These contentions, and the fact arguments and case law urged by plaintiff in support thereof, are tenuous, contrary to the weight of the precedent under Rule 41(b), and ultimately unpersuasive on public policy grounds.

A. Plaintiff's Subsequent Actions Did Not and Cannot "Cure" the Prior Six-Year Delay.

Plaintiff apparently urges that a motion to dismiss under Rule 41(b) can be made only while a delay is in effect, so to speak. If the plaintiff takes some action to move the case on to trial, the previous delay is wiped from the books and plaintiff may proceed as if it never

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[46] *See* note 22, *supra*.

happened. That theory has no support in fact, is contrary to the weight of authority, and is contrary to public policy.

1. *Plaintiff Continued to Stall and Delay in the 1973-1975 Period During Which the "Curing" Activity Is Claimed.*

Significantly, plaintiff's brief begins its recitation of the relevant facts at a point on February 7, 1973 when the case was already five years and nine months old. Pl. Br. 6. In its recitation of good intentions and marginal activity during the period from February 7, 1973 through April 29, 1975 (when the motion to dismiss was filed), plaintiff omits any mention of its continued delay and failure to comply with court orders intended to move the case on for trial. In summary, during this period, plaintiff:

1. delayed from February 7, 1973 to February, 1974 in appointing trial counsel to represent plaintiff (*see* p. 15, *infra*);
2. delayed from February 7, 1973 to March 20, 1974 in raising the objection to continued representation of three defendants by an attorney who would be a witness at trial (*see* p. 15, *infra*);
3. delayed from February 7, 1973 to March 20, 1974 in requesting the court to set a trial date (*see* p. 17, *infra*);
4. delayed from July 5, 1973 to August 21, 1973 in filing a short, pro forma motion to substitute the executors as defendants (*see* pp. 14, 35, *infra*);
5. took no action at all for nearly six months between August 21, 1973 and February 7, 1974 (when the court convened the fifth pretrial conference) (*see* p. 14-15, *infra*);
6. wasted the time of the court and the defendants between February 14, 1974 and March 20, 1974

by filing and then withdrawing a frivolous motion to consolidate the *Raab* and *Less* cases (App. 119-20, 137);

7. delayed the decision on representation for the corporation from June 3, 1974 to July 24, 1974 by raising a totally frivolous unsubstantiated objection (*see* pp. 36-37, *infra*);
8. failed to comply with an order of the court dated June 14, 1974 to prepare an exhibit list (App. 166);
9. failed to comply with a direction of the court on March 19, 1975 to submit promptly a motion to treat the depositions taken in the *Less* case as if they had been taken in the *Raab* case (*see* p. 24, *infra*); and
10. failed to meet the time deadline on May 12, 1975 set by the court for response to defendants' motion to dismiss (App. 238-39)
11. failed to respond in any manner to a single interrogatory served by defendant D'Angelo on May 21, 1975 (App. 351);

There is probably no action taken during that period that plaintiff could point to and claim that it was: (a) taken at plaintiff's initiative; (b) useful in bringing this case on to trial; and (c) timely or diligently completed.

2. Even if Plaintiff Had Engaged in Productive, Affirmative Action During the 1973-1975 Period, that Would Not Overcome the Prior Delay.

None of the plaintiff's actions of late, prompted by the court's demands that the case be moved on for trial, can overcome the effect of his past inaction over a long period of time. There was a similar situation in *Sheaffer* v. *Local 730, Warehouse Employees Union*, 408 F. 2d 204 (D.C. Cir.), *cert. denied*, 395 U.S. 934 (1969), where the plaintiff proceeded in a dilatory fashion from August, 1963 when the complaint was filed until November, 1967 when new counsel was appointed. A trial date was set for January 9, 1968. Four days before trial, the defend-

ants moved to dismiss under Rule 41(b) and their motion was granted. Upholding the trial court's order, the appellate court found:

> "Appellants' lethargy ceased on November 6, 1967, when their present counsel entered the case as co-counsel. We find, however, that after over four years of procrastination his arrival came too late to save appellants' cause of action." 408 F.2d at 205.

The court held that "the trial judge did not abuse his discretion in dismissing for want of prosecution, notwithstanding the impending January 9th trial date." 408 F.2d at 206, n. 2. *See also Hicks* v. *Bekins Moving & Storage Co.*, 115 F.2d 406, 409 (9th Cir. 1940) (where the court pointed out, ". . . subsequent diligence is no excuse for past negligence.").

Plaintiff cites *United States* v. *Myers*, 38 F.R.D. 194 (N.D. Cal. 1964), as support for the proposition that if there was subsequent, diligent activity, a prior delay could be overcome. In *Myers* there was a complaint filed in 1958, and answer filed in 1959, and apparently no further action until a request for admissions was filed about two and one-half years later in 1962. The defendant responded to that request, and shortly thereafter the plaintiff moved for summary judgment. The defendant countered with a motion to dismiss for failure to prosecute and the court held that "plaintiff has not so delayed prosecution as to require dismission of the action." 38 F.R.D. at 197. The court noted that if "a plaintiff is presently prosecuting his claim with reasonable diligence, the action cannot be dismissed because at some earlier time the plaintiff failed to act with diligence." 38 F.R.D. at 197. That reasoning should not be controlling in the case before this court for three reasons: first, it is not founded on any holding that is on point; second, there is substantial authority to the contrary; and third, public policy would not be served by this rule.

The only authority cited in *Myers* to support this proposition is *Rollins* v. *United States*, 286 F.2d 761 (9th

Cir. 1961). That case was not decided under Rule 41(b). It involved a dismissal for lack of jurisdiction. The complaint was filed in 1955 but was not served. In 1958 the clerk put the case on the dismissal calendar and in due course a hearing was held. At that hearing the court ordered that service be completed, which it was, and the case was removed from the dismissal calendar. Subsequently the defendant challenged that ruling on jurisdiction grounds. The trial court dismissed and the appellate court reversed. In dictum, the appellate court pointed out that it might have been within the discretion of the trial court to dismiss for failure to prosecute at the time of the first hearing on the dismissal calendar. However, after obtaining service on the defendant, the plaintiff had proceeded diligently and as the case stood before the appellate court there were then no grounds for a dismissal for failure to prosecute. The holding was limited to reversal of the dismissal for lack of jurisdiction, which was the only issue before the court.

At least two Circuits have adopted a rule contrary to that set out in *Myers*. In *SEC* v. *Power Resources Corp.*, 495 F.2d 297 (10th Cir. 1974), the SEC, as plaintiff, filed a motion for preliminary injunction. The motion was not brought on for hearing until three years later, at which time the defendants moved to dismiss under Rule 41(b) and the trial court granted the motion. A three-judge panel, including Hon. Tom C. Clark, Associate Justice, retired, U.S. Supreme Court, sitting by designation, heard the appeal and held as follows:

> "There is no precise rule as to what circumstances justify a dismissal for failure to prosecute. Instead, the procedural history of each case must be examined to make such a determination. Here, we are faced with a three-year delay. The SEC attempts to excuse this period of inactivity on the grounds it was conducting discovery to obtain relevant information. The record discloses, however, that the SEC was substantially ready for trial as a result of dis-

> covery conducted prior to the institution of the action.
>
> The record also discloses that the SEC made no effort whatsoever to have its motion heard [during the three-year period]. It seeks to place the blame for this upon the trial court, and argues that no local rules exist to inform counsel as to what action, beyond the filing of the motion, is required. This does not excuse its failure to diligently prosecute the case. There is no evidence that the motion would not have been heard if requested." 495 F.2d at 298-99.

Although the SEC had finally brought the motion on for a hearing and was ready to proceed, the motion to dismiss was granted. Similarly, in this case, the plaintiff finally got around to requesting a trial date, and was arguably ready to proceed. But there is no evidence that the trial date would not have been set much earlier if requested. The very recent action in pursuing a trial date cannot overcome the earlier lethargy with which this case was pursued.

The *Sheaffer* case, *supra*, is also substantial authority to the contrary and should outweigh *Myers* because the facts of this case are much closer to *Sheaffer* than to *Myers*. In *Scheaffer* there was a four-year delay until new counsel was appointed; that counsel engaged in sufficient activity to have the case brought on to trial, and the motion to dismiss was granted thereafter. In this case, there was a seven-year delay from 1967 to 1974 when trial counsel was appointed; under trial counsel's supervision there was a request for a trial date and enough activity to bring the case close to trial; and the motion to dismiss was granted thereafter.

In *Finley* v. *Parvin/Dohrmann Co.*, 520 F.2d 386, (2d Cir. 1975) this court put litigants on notice that a strict interpretation of Rule 41(b) would be applied.[47] The

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[47] In *Finley*, a complaint was filed on August, 1970, and thereafter the case was transferred from Illinois to New York. In 1971, the plaintiff noticed some depositions, and by stipulation, these were put

rule in *Power Resources* and in *Sheaffer* is in accord with that intent.

Further, there are important public policy reasons why the rule urged by plaintiff should not be followed by this court. If plaintiff can "cure" a lengthy prior delay by *pro forma* actions to bring a case on for trial, the incentive of plaintiffs to litigate diligently is diluted significantly. The need for prompt, effective action on the part of litigants to bring cases on for trial, and to negotiate responsibly to settle cases, and the need for strong measures available to the courts to maintain control of the calendar all support a rule that permits dismissal for significant delay even if some subsequent action is taken by plaintiffs.

B. Defendants Have Not Waived Their Right to Urge Dismissal for Plaintiff's Failure to Prosecute.

Plaintiff points not only to its actions in prosecuting this case as support for the contention that the motion to dismiss was untimely, but, curiously, also points to actions by defendants that helped move this case forward to trial as support for the same contention. Although not expressed with any clarity, plaintiff's view is apparently that defendants have waived their right to urge dismissal for plaintiff's failure to prosecute. Pl. Br. 16.

Plaintiff specifies two such actions: (1) defendants continued with trial preparations and settlement negotiations after the death of Mr. Taber in February, 1973 and the death of Mr. McDonough in August, 1974; and (2) defendants did not object to plaintiff's proposal that the *Less* case be tried before the *Raab* case.

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off until 1972. The plaintiff did nothing from May, 1972 until March, 1975 when it was assigned to Judge Wyatt in the Southern District of New York. A motion to dismiss was made pursuant to Rule 41(b) and the plaintiff argued that confusion had arisen over how to proceed under the new individual assignment system recently adopted in the Southern District. Judge Wyatt denied the motion to dismiss, but Judge Friendly pointed out, on review, that the Second Circuit "would not have reversed if Judge Wyatt had granted the motion to dismiss." 520 F.2d at 389.

Plaintiff cites no authority with respect to the effect of actions taken by defendants on a motion to dismiss for failure by plaintiff to prosecute an action. Defendants have been unable to find any.

Nor does plaintiff discuss any public policy reason why defendants should be held to have waived their rights with respect to a motion under Rule 41(b) if they proceed with trial preparations or settlement negotations despite a previous delay by plaintiff. It would seem obvious that the public policy considerations are all in the other direction. Settlements are to be encouraged, so defendants' efforts to settle the *Less* case should not have an adverse effect with respect to their rights in the *Raab* case.[48] Similarly, full disclosure through discovery is to be encouraged in order that a fair and efficient trial can be conducted. The trial court found that the discovery requested by defendants was reasonable and could contribute to efficiency at trial. App. 178-83. Public policy would seem to support the path chosen by defendants.

Defendants are well aware that dismissal is a harsh remedy and for this reason, defendants have exhausted all other avenues before seeking dismissal. This case cannot be settled because, although the probable recovery

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[48] Plaintiff points out:

> "(A)fter McDonough's death in August, 1974, preparations for trial of *Less* proceeded without interruption, and no motion to dismiss was made or threatened by the defendants. There is no apparent difference in that circumstance in the *Raab* case, except that the defendants have reason to consider his case stronger than that of Less . . . ." Pl. Br. 20.

The difference in circumstance is obvious. The *Less* claim was almost 25 times larger than the *Raab* claim; and there were important pressures for settlement operating in the *Less* case that did not affect the *Raab* case (*see* notes 5 and 6 *supra*).

If defendants had been unable to settle the *Less* case at a reasonable figure, a motion to dismiss would have been pursued. Similarly, if defendants had been able to settle the *Raab* case at a reasonable figure, no motion to dismiss would have been filed. Defendants never "threatened" to pursue dismissal in either action.

given a complete victory on the merits is $30,000, and although defendants have already paid plaintiff over $28,000, plaintiff's counsel continues to demand $22,000 in settlement. Nor can this case be tried fairly. Although defendants have several logical, sound defenses, they have been deprived of the witnesses necessary to prove them. Dismissal was the only remaining alternative when defendants turned to it in April, 1975.

IV. NO EVIDENTIARY HEARING WAS REQUIRED ON EITHER THE MOTION TO DISMISS OR THE MOTION TO VACATE.

Plaintiff asserts that the lack of an evidentiary hearing on the motion to dismiss and the motion to vacate constitutes an abuse of discretion and a denial of due process. Plaintiff's due process argument is frivolous because plaintiff was permitted very generous opportunities to be heard on both motions. Plaintiff's abuse of discretion argument is without merit because there were no witnesses to be heard, had an evidentiary hearing been held, and because, with respect to the motion to dismiss, plaintiff never requested a hearing.

A. Plaintiff Was Afforded and Utilized the Opportunity to Be Heard with Respect to Both Motions.

The court below afforded plaintiff more than one opportunity to be heard with respect to both motions and plaintiff had both written and oral arguments before the court.

1. *The motion to dismiss.*

The motion to dismiss was filed on April 29, 1975 and was accompanied by an extensive memorandum setting forth in detail the grounds for the motion. App. 187-88, 191-225. The court gave the plaintiff two weeks in which to respond,[49] permitted defendants five days in which to submit rebuttal arguments, and scheduled a hearing for May 19, 1975. App. 238-39. The opposition

[49] Plaintiff failed to meet the deadline set in the court's order, and filed its opposition three days late. App. 243-306.

papers included a 29-page affidavit from Mr. Sweet, counsel for plaintiff, to which he attached 15 pages of documents, App. 243-86; a four-page affidavit from Mr. Heffernan, also counsel for plaintiff, to which he attached nine pages of documents, App. 287-98; and a six-page memorandum of law, App. 299-304.

Pursuant to the timetable set out in the court's scheduling order, defendants submitted their reply memorandum on May 17, 1975, two days after receiving plaintiff's response. App. 307-25.

A hearing was held on May 19, 1975 and counsel for all parties attended. The court heard oral argument for approximately one hour,[50] including argument of approximately 30 minutes from counsel for plaintiff. After the oral argument, and without leave of court, plaintiff submitted two more affidavits, an eight-page supplemental affidavit from Mr. Sweet appended to which were three pages of documents, and a five-page supplemental affidavit from Mr. Heffernan.

Not only was the court quite generous in affording the opportunity to be heard, but plaintiff took full advantage of that opportunity and should not now be heard to complain, primarily on the ground that his arguments were unconvincing.

2. ***The motion to vacate.***

The plaintiff was permitted similar latitude in presenting its arguments to the court with respect to the motion to vacate. On December 15, 1975, plaintiff submitted an 18-page affidavit from Mr. Sweet, attached to which were 35 pages of documents, App. 376-428, a four-page affidavit from Mr. Heffernan, attaching four pages of documents, App. 429-36, and a two-page affidavit from Mr. Montgomery who had been trial counsel for plaintiff in the *Less* case, App. 437-38.

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[50] Plaintiff has not included a transcript of this hearing in the record.

The defendants responded, within the time limit set by the court, with an extensive memorandum of points and authorities in opposition to the motion. App. 442-518.

Counsel for plaintiff appeared before the court at a hearing on January 26, 1976 and presented oral argument. Counsel for plaintiff appeared before the court again on February 5, 1976 and was again permitted oral argument. Tr. 147-53, 156-57, 158-61. At that time, counsel for plaintiff requested and was granted an extension of time in which to file written argument. Tr. 160-61. On February 9, 1976, plaintiff filed a nine-page supplemental affidavit from Mr. Sweet, attaching 14 pages of new documents, App. 529-51, and a four-page memorandum of law. App. 552-55.

Under those circumstances, plaintiff can scarcely complain that he was not afforded an adequate opportunity to be heard. Due process requires nothing more.[51]

B. An Evidentiary Hearing Was Not Required by Rule 43(e) or the Circumstances of This Case.

The matters at issue on the motion to dismiss were particularly appropriate for decision on affidavits and Rule 43(e) specifically permits this procedure.

Rule 43(e) provides:

> When a motion is based on facts not appearing of record the court may hear the matter on affidavits

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[51] *See, e.g.*, discussion of the due process clause in *Boddie* v. *Connecticut*, 401 U.S. 371, 377-78 (1971) (the basic requirement is that a deprivation of life, liberty or property be preceded by notice and an opportunity for hearing appropriate to the nature of the case; the form of the hearing is not fixed).

Plaintiff cites *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233 (1944) in support of his due process contention. That citation is inapposite as the issue there was the adequacy of the notice (posting on the courthouse door), not adequacy of the hearing. 321 U.S. at 245-46.

> presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

No oral testimony was required under the rule and, even if requested, could have been denied by the court below because the circumstances did not warrant it.

There were two limited fact issues before the court below: what had the plaintiff done to move this case on to trial and what excuses did the plaintiff have for not doing more? There were four potential sources of proof on these issues: (1) testimony from the lawyers who participated in the case and observed the manner in which plaintiff pursued the action; (2) documents relevant to the case and communications of the parties about the case; (3) matters as to which judicial notice would be proper [52] and (4) testimony from the clerk and the magistrate who had had some peripheral dealings with this case.

Affidavits had been submitted by every lawyer (still alive) who had participated in either the *Less* or the *Raab* case;[53] the relevant documents had been attached to the lawyers' affidavits; and the matters proper for judicial notice had been drawn to the court's attention.

Under these circumstances, it was appropriate for the court below to hear the matter without oral testimony. No evidence was offered from lay witnesses as to whose testimony cross-examination might have been

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[52] Statements and observations by the court, practices of the court with respect to notes of issue and pretrial statements, and the docket file maintained by the clerk of the court.

[53] Messrs. Sweet and Heffernan, counsel for plaintiff, submitted seven affidavits (*see* note 36, *supra*); Ms. Siemer, counsel for defendants Taber Instrument Corporation, Cindy Taber and Marine Midland Bank-Western submitted two affidavits, App. 227-35, 326-29; Messrs. Hitchcock, Fuzak and Runfola, counsel for defendants D'Angelo, Hildebrandt and Manasen respectively, each submitted an affidavit, App. 493-502, 506-11, 517-18; and Mr. Boreanaz, who participated only in the *Less* case as counsel for defendant Himmelfarb, also submitted an affidavit. App. 503-05.

illuminating. There was little conflict in the documentary evidence before the court about what actions the plaintiff had taken; the conflict arose only over the adequacy of plaintiff's excuses for not taking action. The facts were particularly within the capacity of the trial court to comprehend readily because the court itself had been involved in the development of these facts over the nine years that the case had been before it and the assistance of oral testimony in that regard was not required.

The decision of the court below stated eighteen principal findings of fact. Plaintiff can point to no source of evidence with respect to any of those eighteen findings of fact, that would require oral testimony at an evidentiary hearing.

Plaintiff does single out two findings of fact as to which cumulative evidence could have been had through an evidentiary hearing. The court found:

1. "In 1972 the case went to the Magistrate for a pretrial conference but, since plaintiff had failed to comply with the order directing the filing of a pretrial statement, the meeting was adjourned until December 13, 1972. For various reasons the conference was adjourned again until February 1973 when plaintiff finally filed the directed statement . . . ." App. 358.

2. "The plaintiff has not even attempted to explain why he failed to comply, from April 1971 until February 1973, with the court order to file a pretrial statement." App. 367.

These findings are based on the documents before the court: the notices and orders, App. 96-97, 98-99, 100; the pretrial statements actually filed, App. 101-16; and the many affidavits of plaintiff's counsel explaining why they did what they did. *See* note 36 *supra*. No oral testimony was required.

Plaintiff now urges that the oral testimony of the magistrate should have been taken at an evidentiary hearing.[54]

Only two points need be made in response to plaintiff's challenge: (1) the trial court had adequate support in the record for its findings; and (2) even without the two findings of fact specifically related to the magistrate's involvement, and even if plaintiff's version of the facts with respect to that eight-month period had been believed by the trial court, the remaining sixteen findings of fact are sufficient basis for the conclusion that plaintiff failed to prosecute this case and therefore dismissal under Rule 41(b) should be granted.

C. Plaintiff Is Estopped on Appeal Because an Evidentiary Hearing Was Not Requested Until After the Motion to Dismiss Was Granted.

Plaintiff's contention that there was an abuse of discretion in failing to hold an evidentiary hearing with respect to the motion to dismiss is remarkable indeed in light of the fact that plaintiff never asked the court to exercise its discretion and to hold such a hearing.

Nowhere in any of the many papers filed by plaintiff before or *after* the oral argument on the motion to

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[54] The magistrate became involved in the summer of 1972 when the case was sent to him to complete pretrial proceedings. On July 13, 1972 the magistrate issued a notice that a pretrial conference would be held on August 17, 1972. App. 96. Attached to that notice was a pretrial order, signed by the court, requiring the parties to submit pretrial statements prior to the conference and specifying the content of those pretrial statements. App. 97. On August 17, 1972 the pretrial conference was held but no pretrial statements were submitted. On November 17, 1972, the magistrate issued another notice of a pretrial conference set for December 13, 1972. App. 98. Appended to that notice was a similar pretrial order requiring submission of pretrial statements. App. 99. That conference was postponed to December 28, 1972 and then postponed again to February 7, 1973. App. 100. This second conference was held, pretrial statements were submitted, and thereafter the magistrate sent the case back to the court to be put on the calendar for trial.

dismiss is there *any* mention of *any* necessity for an evidentiary hearing. Nor was any such request raised at the oral argument of the motion.

It was only after the motion was granted and plaintiff cast about for grounds to challenge the court's decision that the possibility of an evidentiary hearing emerged. App. 376-77.

Even if an evidentiary hearing had been required, plaintiff is estopped to allege this as a ground for appeal. In a parallel case, *Bowman* v. *Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966), there were conflicting affidavits submitted in support of and in opposition to a motion to dismiss for lack of personal jurisdiction. The trial court heard the matter on the affidavits and granted the motion to dismiss. The plaintiff appealed, asserting as a ground the failure to conduct an evidentiary hearing. The court held:

> "No request was made by appellants at any time to be allowed to offer oral testimony. For this reason, they cannot now complain of the procedure adopted by the lower court for deciding the factual issues, *i.e.*, to determine the facts wholly from the conflicting affidavits presented." 361 F.2d at 716.

Similarly, in *Canvas Fabricators, Inc.* v. *William E. Hooper & Sons Co.*, 199 F.2d 485 (7th Cir. 1952), where conflicting affidavits were offered, the motion was decided on those affidavits and the appellant contended that an oral hearing was required. The court affirmed the lower court's order, holding:

> "We may assume, without deciding, that plaintiff upon a proper request would have been entitled to offer oral testimony but, even so, plaintiff cannot now complain, because no such request was made. So far as the record discloses, both sides were agreeable to a submission of the facts as they did, that is, in the form of affidavits. It is now too late to complain that the court should have ascertained the facts in some other manner." 199 F.2d at 488.

See also McGuire v. *Columbia Broadcasting System, Inc.*, 399 F.2d 902, 906-07 (9th Cir. 1968) (plaintiff's subpoenas to witnesses for purpose of securing testimony at an evidentiary hearing on motion for summary judgment quashed because plaintiff failed to depose the proposed witnesses first).

Procedural objections to the action of a trial court must be made in a timely fashion to give the court an opportunity to correct the error. "It is imperative to an efficient and fair administration of justice that a litigant may not withhold his objections, await the outcome, and then complain that he was denied his rights if he does not approve the resulting decision." *Brotherhood of Railroad Trainmen* v. *Chicago M.St.P. & P.R.R.*, 380 F.2d 605, 608-09 (D.C. Cir.), *cert. denied*, 389 U.S. 933 (1967).

D. Plaintiff's Request for an Evidentiary Hearing With Respect to the Motion to Vacate Is Plainly Frivolous.

Plaintiff would be entitled to an evidentiary hearing with respect to a motion under Rule 60(b) only if he proposed to adduce evidence of mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, misrepresentation, misconduct of an adverse party, a void or satisfied judgment, or some other reason justifying relief from the operation of a judgment. *See* Rule 60(b) Federal Rules of Civil Procedure. Plaintiff's proposed evidence with respect to the magistrate does not meet any of those criteria.

Most plainly, it is not newly discovered evidence. Mr. Sweet's affidavit of May 14, 1975, submitted prior to oral argument, states:

> "In preparing this affidavit, I spoke with Magistrate Maxwell on May 8th, 1975, and after reviewing his file he informed me that his notes show that we reported both cases ready for trial at the February 7, 1973 conference, that he so marked them and

accordingly referred them to the Court for the scheduling of trial date." App. 255.

Any evidence with respect to the Magistrate's view of counsel's prompt and full compliance during the proceedings before the Magistrate was available to plaintiff at the time of argument on the motion to dismiss. Any failure by counsel to present fully this evidence is not a basis for relief under Rule 60(b), therefore no evidentiary hearing is required.[55]

Further, virtually every argument of fact cited in support of the motion to vacate had been before the court, in almost exactly the same terms, at the time the motion to dismiss was decided. Table I, set out in the Joint Appendix at pages 476-92, analyzes each of the 54 assertions of fact set out in the 33 pages of supporting affidavits submitted by plaintiff's counsel. At least 40 of these assertions of fact were made in nearly exactly the same terms in previous affidavits submitted by Messrs. Sweet and Heffernan prior to the decision on the motion to dismiss.[56] The remaining 14 assertions of fact involve

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[55] Plaintiff cites *United States ex rel. Bruno* v. *Herold*, 368 F.2d 187 (2d Cir. 1966), for the proposition that the assertion in the Sweet affidavit submitted in support of the Rule 60(b) motion with respect to the magistrate's testimony must be considered as true. That citation apparently stems from a misunderstanding of the *Herold* case. In *Herold*, the affidavits submitted by the government plainly contained newly discovered evidence. Therefore, for the limited purpose of testing the denial of the Rule 60(b) motion *despite* the presence of newly discovered evidence, that evidence is presumed to be true.

In this case, the trial court never had to reach that point. It was plain from the extensive analysis submitted by defendants, App. 476-92, that the affidavits submitted by plaintiff contained *no* newly discovered evidence. All of the matters presented in support of the Rule 60(b) motion had been before the court when the motion to dismiss had been decided. That alone was sufficient ground to deny the Rule 60(b) motion and the court never had to consider whether the newly discovered evidence was sufficient to require a different outcome, so no presumption of truth was required.

[56] Table I, items numbered 1-14, 16, 18, 24-28, 31-32, 34-41, 45-52, 54. App. 476-92.

matters also before the court from other sources. Eight of these are plaintiff's counsel's version of the proceedings at various appearances before the court.[57] Two are descriptions of the form of documents already in the record;[58] another two are assertions with respect to practice before the court below.[59] The remaining two miscellaneous items deal with facts that are totally irrelevant to the motion to vacate.[60]

All of these assertions are essentially arguments with respect to the weight of the evidence that could be, and have been, raised on appeal. The court below correctly held that none of the evidence offered by plaintiff was properly raised under Rule 60(b) and for that reason no evidentiary hearing was required.[61]

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[57] Table I, items 15, 17, 21, 22, 33, 43, 44, 53; App. 476-92.

[58] Table I, items 20, 23; App. 482-83.

[59] Table I, items 29, 30; App. 485.

[60] Table 1, items 19, 42; App. 482, 489.

[61] Plaintiff cites three cases as support for the contention that there should have been an evidentiary hearing on the Rule 60(b) motion. Pl. Br. 34. None is on point. In *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575 (1946), there was no Rule 60(b) question. The court pointed out that the assessment of attorneys' fees required a hearing, then decided the case on a narrower ground that the particular attorneys involved, who were acting as amici curiae, were not entitled to fees at all. In *FDIC* v. *Alker*, 234 F.2d 113 (3d Cir. 1956), the trial court refused to consider his jurisdiction under Rule 60(b)(6) even though directed to do so by the Court of Appeals. Plaintiffs petitioned the Court of Appeals for a writ of mandamus and in its decision issuing the writ, the Court directed the trial court to conduct a full evidentiary hearing as the long history of the case before both courts indicated was necessary. There is nothing in the circumstances of this case suggesting that a similar result would be appropriate. In *Laguna Royalty Co.* v. *Marsh*, 350 F.2d 817 (5th Cir. 1965) the evidence asserted to be "newly discovered" was a series of extremely technical facts about the quality and quantity of geological formations involved in an oil drilling dispute. The Court of Appeals held that the judge could not assess these technical matters from affidavits alone and that a full hearing was required at which expert testimony could be adduced. There are no highly technical matters at issue in this case on which expert testimony is required.

CONCLUSION

For the reasons stated above, the judgment of the court below should be affirmed.

Respectfully submitted,

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June, 1976

APPENDIX A *

Items of Activity in the *Less* case from May 8, 1967 to June 3, 1974 Identified by Plaintiff as Relevant to the *Raab* case.

Item No.	Date	Activity	Appendix Page
1	7/31/67	deposition of Ralph Taber	338
2	8/ 1/67	deposition of Ralph Taber (cont.)	338
3	8/ 3/67	deposition of Ralph Taber (cont.); deposition of Warren Hildebrandt	338
4	8/ 4/67	deposition of Benjamin Manasen	338
5	10/26/67	deposition of Warren Hildebrandt (cont.)	338
6	11/ 9/67	deposition of D'Angelo	338
7	/ /67	attended calendar call	380
8	2/12/68	deposition of D'Angelo (cont.)	338
9	5/17/68	deposition of Till	338
10	/ /68	attended calendar call	380
11	1/23/69	affidavit in opposition to motion to compel answers (Less deposition)	247
12	9/26/69	deposition of Bartlo	338
13	10/15/69	deposition of Bartlo (cont.)	338
14	1/29/70	deposition of McDonough	338
15	4/24/70	letter to McDonough	295
16	4/27/70	letter to McDonough	294
17	6/ 2/70	letter to McDonough	296
18	6/23/70	letter to McDonough	272
19	10/ 1/70	deposition of McDonough (cont.)	338
20	/ /71	conversation with Kaufman	250
21	/ /71	conversations with Letts	250
22	/ /71	conversations with Boreanaz	251
23	3/29/71	letter to Boreanaz	273
24	5/ 5/71	notices of deposition served on Singleton and Himmelfarb	250-51
25	6/ 1/71	letter to McDonough	274

* A different version of Appendix A, based on the four affidavits of plaintiff's counsel submitted in opposition to the motion to dismiss and including activities in both *Less* and *Raab* actions, was appended to the decision of the court below. App. 370-71.

Item No.	Date	Activity	Appendix Page
26	6/17/71	affidavit in opposition to motion to quash subpoena (Singleton deposition)	250
27	7/ /71	attended hearing on motion to quash	250
28	8/19/71	letter to Boreanaz	293
29	9/ 9/71	attended deposition of Himmelfarb	252
30	10/12/71	motion to strike Himmelfarb's answer	252
31	10/15/71	attended hearing on motion to strike	252
32	6/19/73	conversation with Hitchcock	533
33	7/ 5/73	conversation with Bain	256, 533
34	1/18/74	conversations with Hitchcock, Siemer	385
35	2/ /74	retained trial counsel	437

APPENDIX B

Items of Relevant Activity in the *Raab* case from May 10, 1967 to June 3, 1974 as Identified by Plaintiff.

Item No.	Date	Activity	Appendix Page
1	5/10/67	filed Complaint	13-21
2	10/26/67	filed Note of Issue	39-40
3	10/31/68	filed Note of Issue	41-42
4	3/13/70	attended call of dismissal calendar	380-81
5	6/12/70	filed report to the court	381, 433
6	7/13/70	deposition of McDonough	382
7	10/27/70	filed Note of Issue	82-83
8	3/ 2/71	filed Motion for Permission to File Note of Issue *nunc pro tunc*	84-88
9	4/ 2/71	attended pretrial conference	89
10	10/28/71	filed Note of Issue	93-94
11	8/17/72	attended pretrial conference	96
12	2/ 5/73	filed pretrial statement	101-12
13	2/ 7/73	attended pretrial conference	
14	3/13/73	attended pretrial conference	117
15	8/21/73	filed Motion to Substitute Executors	*
16	2/ 7/74	attended pretrial conference	118, 258
17	2/14/74	filed Motion to Consolidate *Less* and *Raab* cases	119-20
18	3/20/74	withdrew Motion to Consolidate *Less* and *Raab* cases	135-37
19	4/29/74	attended pretrial conference	162
20	6/ 3/74	attended pretrial conference	163

* This document is not included in the Joint Appendix. It is item No. 17 in the record.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JUNIA E. RAAB, Plaintiff-Appellant, v. TABER INSTRUMENT CORPORATION, ET AL., Defendant-Appellees.	Docket Numbers 76-7004 76-7130

CERTIFICATE OF SERVICE

I, Theodore S. Sims, a member of the Bar of this Court, do hereby certify that I have, this 17th day of June, 1976, served three copies of the Brief for Defendants Taber Instrument Corporation, Joseph D'Angelo, Benjamin Manasen, Warren Hildebrandt, Cindy Taber and Marine Midland Bank-Western on Plaintiff by mailing the same, with first-class airmail postage thereon prepaid, to David L. Sweet, Heffernan, Sweet & Murphy, 1202 Marine Trust Building, 237 Main Street, Buffalo, New York 14203.

Theodore S. Sims